United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Docket No. 74-1173

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

DELPHINE E. PLOURDE,
PLAINTIFF_ APPELLEE

vs

SHERBURNE CORPORATION,
DEFENDANT - APPELLANT

Appeal from the United States District Court

for the District of Vermont

Honorable James S. Holden, Chief U. S. D. J.

BRIEF OF PLAINTIFF-APPELLEE

Bloomer & Bloomer, Esqs.
Attorneys for Plaintiff-Appellee
75 Merchants Row
Rutland, Vermont 05701

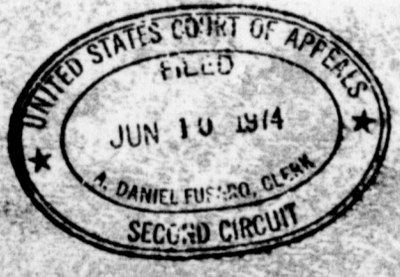

TABLE OF CONTENTS

TABLE OF CASES

ISSUES

The Plaintiff-appellee, Delphine Plourde, is uncertain how to proceed in connection with the "issues". Rule 28 of the Federal Rules of Civil Procedure is concerned with "briefs" and 28 (a) (2) states: "A statement of the issues presented for review". 28 (a) (4) states: "***The argument shall contain the contentions of the appellant with respect to the issues presented and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." (emphasis supplied)

The reason for the Plaintiff's uncertainty is that while the issues are stated on page 1 of the defendant's brief, the arguments do not refer to the issues presented.

For example, on page 14 of the brief there is an argument relative to "B. Burden of Proof". That is not mentioned at all in the issues on page 1.

On the same page another issue is set forth as "C. The Trial Court Allowed the Jury to Speculate". That also is not mentioned in the issues shown on page 1.

And on page 16 an apparent issue "D. Question of law" is set forth. This too is not mentioned in the issues on page 1.

As the plaintiff interprets the defendant's brief, there are two issues, both referring to defendant's motion to set aside the verdict and enter judgment for defendant notwithstanding the verdict. The first issue is whether or not the act of the

defendant ski school instructor leaving the plaintiff-student on the slope in violation of the Ski School Manual, was the proximate cause of the plaintiff's fall and injury; and the second issue is whether the plaintiff assumed the risk.

STATEMENT OF THE CASE

Plaintiff adopts defendant's statement of the case.

STATEMENT OF FACTS

The plaintiff adopts the statement of facts set forth on page 3 through 5 of defendant's brief and supplements those facts as follows:

The plaintiff was in excellent health in January of 1972 and engaged in the sports of swimming, bicycle riding, hiking, camping, tennis, water skiing, bowling and horseback riding (Tr 28). She had never skied prior to going to the defendant's ski area in January of 1971 (Tr 28).

The plaintiff was learning to ski using the graduated length method, and used three or four foot skis during the first three days, namely through Wednesday (Tr 39, 40). On Thursday, the fourth day of her ski-week lessons, she was issued a little longer skis, about five feet in length (Tr 41). On the fifth day, Friday, the day of the injury, she was issued ski poles for the first time. That day the instructor also took the class to the top of the mountain for the first time (Tr 49). In descending, the instructor would lead the way down and stop. He would go 20,

25, or 30 feet and then would stop, call the name of the student, and the student individually would ski to him (Tr 49). That is the way that the plaintiff proceeded all the way down the mountain to the top of the Snowshed area (Tr 50). The conditions at the top of the mountain were very rough and it was very hard getting down (Tr 50). The plaintiff was not accustomed to this kind of skiing (Tr 50). The instructor told the students to keep the poles at their sides so as not to puncture their chests or lungs (Tr 50). The plaintiff found that it was more awkward and different skiing with poles (Tr 50). When the plaintiff got to the Snowshed area, this being the novice area, she was tired (Tr 51). At the top of that area the instructor told the class that he was late for his next class which was forming at the base, that they looked like a bunch of drowned rats and that he was sorry he had taken them down the slope. He said that they weren't ready and told the students to get down the slope any way that they could and that he would see them the next day (Tr 52). This was the first time that the instructor had left them on the slope alone during the course of a lesson (Tr 52). Less than a minute after the instructor left the plaintiff was going down the mountain and her skis started to pick up speed and she tried to maneuver herself but she just didn't know what to do with the poles or how to get out of the speed that she was picking up, and as she was turning left she fell (Tr 53). At the time of the fall she heard something tear and thought that she had torn her ski parka. She hadn't.

Actually what she had torn was a portion of her knee (Tr 53).

The defendant utilized "The Killington Ski School Manual" which provides for instructors' behavoir, liability etc. (Pl. Ex.22)

The plaintiff called as a witness Mr. Leo Denis, the manager of skiing at defendant ski area. He was responsible for the ski school and skiing services. (Tr 101). This witness was questioned about the Ski School Manual, and in particular about the ski school policies shown on page 29 thereof. The Ski School Manual is a manual for instructors and page 29 provides for their conduct, violations, and penalties. On that page will be found that one violation is "Jeopardizing ski school student's safety", and the penalty therefor is termination of the instructor's employment. (Pl. Ex.22, page 29).

On page 33 of the Ski School Manual it is stated "The instructor must exercise extreme care for his students, and under no circumstances will students be exposed to hazardous conditions, excessive speed, and the like. Never dismiss students or leave a student on the trail or slope." (Emphasis supplied).

Mr. Denis, the defendant's manager of skiing, testified that dismissing a student and leaving a student on the trail or slope would be one of the things which would be considered jeopardizing the ski school student's safety (Tr 153). This would result in termination of employment for first offense. (Tr 153,154). The first offense for arriving late for a lesson is a warning. (Ski School Manual, page 29).

ARGUMENT

I. ARGUMENT AS TO PROXIMATE CAUSE

At the outset it should be clear that Judge Holden in his instructions to the jury, did instruct relative to proximate cause, and the defendant did not except to either the fact that the instructions relative to proximate cause were included in the instructions nor as to any deficiency in the instructions.

The question of proximate cause was brought up by the Court early in his charge (page 360) and then explained in detail on pages 371 and 372. The court again mentioned proximate cause on page 375. The court supplied the jury with written interrogatories, and one interrogatory was whether or not the defendant was negligent and "whether its negligence was a proximate cause of the accident". (Tr 376) There were no exceptions by the defendant to that portion of the charge.

Referring again to the issues stated on page 1 of defendant's brief, apparently the issue is not in connection with the charge, but in connection with the court's failing to set aside the plaintiff's verdict and judgment and enter judgment for the defendant, notwithstanding the verdict, because of the plaintiff's failure to prove proximate cause.

In Vermont a motion to set aside the verdict and enter judgment for the defendant notwithstanding the verdict is considered in the same light as a motion for a directed verdict.

The Vermont law relative to this subject matter was recently set forth in the case of Dindo vs Denton 130 Vt. 98, 109 (1972):

> "In passing on the defendants' motion for a directed verdict, the evidence must be viewed in the light most favorable to the plaintiff and the effect of modifying evidence is to be excluded. Hedman v. Siegrist, 127 Vt. 291, 293, 248 A.2d 685 (1968); Eastman v. Williams, 124 Vt. 445, 449, 207 A.2d 146 (1965). All conflicts are resolved against the defendant, and contradictions and contrary inferences are for the jury to resolve. Berry v. Whitney, 125 Vt. 383,384,385,217 A.2d 41 (1966). A motinn for judgment notwithstanding the verdict is tantamount to a motion for a directed verdict and is passed upon in the same way. Campbell v. Beede, 124 Vt. 434,435,207 A.2d 236 (1965). Such a motion cannot be granted if there is any eivdence fairly and reasonably tending to justify the verdict. Smith v. Blow & Cote, Inc. 124 Vt. 64, 66, 196, A.2d 489 (1963)."

Another recent case bearing upon the subject matter is Scrizzi vs Baraw 127 Vt. 315, 322:

> "The right to set aside a verdict is based, ultimately on the proposition that an injustice would result from permitting the verdict to stand. Grow v. Wolcott, 123 Vt. 490, 493, 194 A.2d,403. Verdicts are not lightly to be disregarded, for it is the proper province of the jury to settle questions of fact. Grow v. Wolcott, supra, P. 493, 194 A. 2d,403."

> "In passing on defendant's motion, the evidence must be viewed in the light most favorable to the plaintiff and the effect of modifying evidence is to be excluded. Eastman v. Williams, 124 Vt. 445, 449, 207 A.2d 146."

To the same effect in the same volume are Beaucage vs. Russell 127 Vt. 58, 60; and Stoneking vs Orleans et al 127 Vt. 161, 167.

Some older cases supporting the same general proposition are Ready v. Peters, 119 Vt. 10 at 11, and Peterson vs Post, 119 Vt. 445, 451, and Perkins vs Vermont Hydro Electric Corp. 106 Vt. 367 at 399.

Defendant's motion to set aside the verdict ***** was addressed to the sound discretion of the trial court. Dindo vs Denton supra at 110.

Viewing the evidence in the light most favorable to the plaintiff, and resolving all conflicts against the defendant, it is apparent that the motion can't be granted as there is evidence fairly and reasonably tending to justify the verdict. The Court considered these and in the exercise of its discretion denied the motion.

The evidence fairly and reasonably tending to justify the verdict for the plaintiff is,briefly, that the Ski School Manual provides that the instructor must exercise extreme care for his students, and under no circumstances allow the students to be exposed to hazardous conditions and excessive speed; with the precaution to never dismiss students or leave a student on the trail or slope. The undisputed evidence is that this was done.

Mr. Denis, the manager of skiing at the defendant ski area, testified that the dismissal of a student by an instructor on the trail or slope would be one of the things which would be considered jeopardizing the ski school students' safety, which in turn would result in termination of employment of the instructor for

first offense. The defendant, in effect, admits that its instructor violated its own safety regulations.

While the instructor was with the student plaintiff, he would go twenty to thirty feet ahead of her, stop, call her name, and then she would ski down to him, under his observation and guidance. The Plaintiff fell during the course of the instruction, but her speed was not such as to cause injury. After the instructor abandoned the plaintiff on the mountain (he knowing that they were tired and stating that they looked like a bunch of drowned rats, and stating that he was sorry that he had taken them down the slopes) the plaintiff started down the mountain and picked up speed. But she didn't know what to do with the poles that had just been issued that day, and didn't know how to get out of the speed that she was picking up, and she got going at a sufficient rate of speed so that when she eventually fell she did so with such violence that she severely injured her knee. Under those facts it was the proper province of the jury to determine whether or not the defendant was negligent; and whether that negligence was the proximate cause of plaintiff's injury. The Court gave proper instructions, which were not excepted to, and the jury brought in a plaintiff's verdict, which should not be taken lightly. The verdict and judgment thereon should not be set aside.

ARGUMENT AS TO ISSUE I, 2.

DID THE COURT ERR IN FAILING TO SET ASIDE THE VERDICT AND JUDGMENT AND ENTER JUDGMENT FOR THE DEFENDANT BECAUSE OF ASSUMPTION OF RISK BY THE PLAINTIFF (AS SET FORTH ON PAGE 1 OF DEFENDANT'S BRIEF.)

The assumption of the risk was included in the court's instructions to the jury, as will be noted on pages 359, 361, 372 and 374 of the charge. The plaintiff excepted to the inclusion of assumption of the risk on page 385.

A leading Vermont case on assumption of the risk is Killary vs Burlington-Lake Champlain Chamber of Commerce, Inc., 123 Vt. 256, 262, 263 (1962) wherein Defendant Chamber of Commerce presented a boat race on Burlington Harbor. The Plaintiff was a participant in outboard motor racing and received injuries when the boat that he was operating struck a three foot wake created by a spectator boat, causing his boat to upset, with the result that the Plaintiff participant was run over by a following racing boat, with severe injuries caused by the whirling propeller of the boat that passed him.

In commenting upon assumption of the risk, the court stated on pages 262 and 263:

> "The assumption of risk doctrine has no application unless there is knowledge of the existence of the risk, together with an appreciation of the extent of the danger. One cannot assume a risk unless one knows about it, appreciates it, and consents to assume it. It is only when one, knowing and compre-

hending the danger, voluntarily exposes himself to it, even though not negligent in so doing, he is deemed to have assumed the risk for an injury resulting therefrom. Lewis v Vermont Gas Corp., 121 Vt. 168, 184, 151 A.2d 297, and cases cited thereunder. Mere knowledge of the risk does not necessarily involve consent to the risk. The circumstances must be such as to warrant the inference that the plaintiff encountered the risk freely and voluntarily with full knowledge of the nature and extent thereof."

"In order for the plaintiff to have full knowledge of the nature and extent of the risk that he was to encounter in the case at hand, it was necessary for him to have been fully aware of several circumstances." ****

"Under the circumstances of this case, it cannot be said that the evidence justified an inference that the plaintiff had the full knowledge of the nature and extent of the risk and danger which he was to encounter, and then voluntarily exposed himself to it, which would be necessary for the application of the doctrine of the assumption of risk." (underline supplied)

Applying the above to the facts in the instant case, the plaintiff had no way of knowing that the instructor was going to leave her on the hill, he never having done so before, and, therefore, she could not have voluntarily exposed herself to the risk of being left on the hill, as in the past the instructor had accompanied the class to the bottom, and instructed them throughout the descent.

The most recent case which the plaintiff has found bearing directly upon that aspect of the doctrine of assumption of the risk at issue in the instant case is Baldwin vs Vermont Railways, 126 Vt.

70,76 (1966). After verdict and judgment for the plaintiff, the Defendant moved for judgment notwithstanding the verdict, which was denied, and an appeal was taken.

Briefly, the facts are that the Plaintiff was injured as a result of a collision between a truck that he was operating and a locomotive owned by the defendant. It was stated at page 76:

> "The defendant had the burden of proof upon the issue of assumption of the risk by the Plaintiff, 12 V. S. A. 1024. The argument of the defendant would appear to be that plaintiff, by travelling over a familiar but obscured road that lead to the crossing during a ninety minute period when he had knowledge that a train would, during that period, use the crossing, voluntarily assumed the risk, of collision with the train as a matter of law.
>
> " The defendant failed to show that the Plaintiff had any other way to go to and from his home except by the route in question. The Plaintiff could not 'reasonably elect' whether or not he should expose himself to the danger of the hidden crossing in going to and from his home. No other road was available." (emphasis provided)

Applying this to the facts in the instant case, it is apparent that the Plaintiff Plourde could not "reasonably elect" whether she should go down from the top of the Snowshed Area with her newly acquired ski poles or whether she shouldn't. No other method of descent was available. The instructor was not available to assist. The Defendant failed to carry the burden of proof on the issue of assumption of the risk. The trial court was correct in refusing to set aside the verdict and enter judgment for the Defendant notwithstanding the verdict.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF OF PLAINTIFF-APPELLEE on Sherburne Corporation, the DEFENDANT-APPELLANT, by delivering two copies of the same to its attorneys of record, Ryan, Smith & Carbine, Esqs., Mead Bldg., Rutland, Vermont this 17th day of June, 1974.